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PUTEH AMAN POWER SDN BHD

v.

BITTERSWEET ESTATES (SABAH) SDN BHD (NO 3)

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HIGH COURT MALAYA, KUALA LUMPUR
ZABARIAH MOHD YUSOF J
[SUIT NO: S-22NCVC-953-10-2011]
11 JUNE 2012

C ***CIVIL PROCEDURE:*** *Contempt of court - Order of committal, application for - Notice of motion - Failure to comply with order of court - Whether there was satisfactory explanation given for not complying with order - Whether there were mitigating factors - Whether contemnors' apology to court genuine - Contemnors found guilty of contempt - Whether*
D *plaintiff discharged onus of proof beyond reasonable doubt - Sentences to be imposed*

The plaintiff obtained an *inter partes* Mareva injunction against the defendant on 15 December2011 ('December order') requiring
E Bittersweet Estates Sabah Sdn Bhd ('defendant'), Bittersweet Estates Sdn Bhd ('BESB') and several other parties to make certain disclosures relating to the accounts of the defendant and BESB by way of affidavit to be filed within seven days from the date of service of the order on the six parties. The December
F order was duly served on the six parties including the directors and company secretaries involved. However, the six parties refused, failed or neglected to comply with the December order. Subsequently, the plaintiff filed the notice of motion for committal proceedings (encl. 90) against the six parties. The six contemnors
G were found guilty of contempt. Hence, the issue that arose was only with regards to (i) whether there were mitigating factors; (ii) whether the contemnors have apologised to the court; and (iii) the sentences to be imposed.

Held (finding contemnors guilty of contempt of court):

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(1) There was no excuse for the conduct of the directors involved. The defendant and BESB were warned by Cik Norliza of Messrs Zul Rafique & Partners, former counsel of the defendants, of the said order and the repercussions of
I failing to comply. As far as the directors were concerned, it was highly improbable that as directors they did not know the

implication of disobeying a court order. It was incumbent on them to consult a lawyer. Ignorance of the law, if any, was no excuse. The directors had only started to take action after the committal papers were served on them on 27 February 2012. These showed the lackadaisical attitude of the directors that they had taken with regards to the December order. Similarly with the company secretaries, they would have knowledge of the existence of bank accounts as well as landed properties, if any, of the defendant and BESB. After being served twice with the December order, the company secretaries could have taken the effort to comply with the same, which they chose not to. Hence, there was no mitigation shown by the alleged contemnors. (paras 13, 29-30)

(2) To date, the contemnors still have not complied with the order. The fact that they continue to disobey the December order by not disclosing the value showed that there was a deliberate and contumacious breach of the December order. They have been duly advised and warned as to the consequences of non-compliance. They began to take the December order seriously after the committal papers were served on them. This fact negated their contention that they did not mean any disrespect to the court. Therefore, there was no satisfactory explanation given for not complying with the order. Effectively, there were no mitigation factors which could aid the alleged contemnors and the apologies were spurious. (para 31)

(3) The plaintiff had discharged the onus of proof beyond reasonable doubt that the contemnors had committed contempt of court. Thus, the following sentences were passed: (i) directors of the defendant to pay RM100,000 each in default thereof a sentence of five months imprisonment; (ii) directors to be fined RM70,000 each in default four months imprisonment and (iii) company secretaries fined RM10,000 each in default of two weeks imprisonment. (paras 34 & 35)

[Order accordingly.]

Legislation referred to:
Rules of the High Court 1980, O. 52 r. 2

For the plaintiff - Teh Meng Teik (Wong Sze Si with him); M/s Cheah, Teh & Su
For the defendants/alleged contemnors - Viswanathan; M/s VS Viswa & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Zabariah Mohd Yusof J:

[1] Enclosure 90 is the notice of motion to commit the following persons/body for contempt:

(i) Bittersweet Estates (Sabah) Sdn Bhd ("defendant");

(ii) Bittersweet Estates Sdn Bhd (BESB) ("BESB");

(iii) V Krishnappan a/l PL Venkatachalam Chettiar ("Krisnappan");

(iv) Rama Narayanan a/l N. Sathappan ("Rama");

(v) Subramaniyam a/l Narayanaswamy ("Subramaniyam"); and

(vi) Lim Sin Chuan ("Lim")

for disobeying, disregarding and/or defying the court order dated 15 December 2011 ("December order") by failing, refusing and/or neglecting to comply with the December order which *inter alia* required the defendant and BESB to inform the plaintiff in writing all of its assets in and/or outside of Malaysia whether in its own name or not and whether solely or jointly owned, giving the value, location and details of all such assets and to confirm such information in an affidavit which was required to be served on the plaintiff's solicitors within seven days of the service of the December order on the defendant and BESB.

Background

[2] The plaintiff obtained an *inter partes* Mareva injunction against the defendant on 15 December 2011 ("December order").

[3] The December order requires:

(i) Bittersweet Estates (Sabah) Sdn Bhd ("defendant"); A

(ii) Bittersweet Estates Sdn Bhd (BESB) ("BESB");

(iii) V. Krishnappan a/l PL Venkatachalam Chettiar ("Krisnappan");

(iv) Rama Narayanan a/l N. Sathappan ("Rama"); B

(v) Subramaniyam a/l Narayanaswamy ("Subramaniyam"); and

(vi) Lim Sin Chuan ("Lim"),

to make certain disclosures relating to the accounts of the C defendant and BESB by way of affidavit which was to be filed within seven days from the date of service of the order on the six parties.

[4] It is not disputed that: D

(i) the December order had been duly served on the six parties;

(ii) the six parties have refused, failed or neglect to comply with the December order.

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[5] Subsequently the plaintiff filed the notice of motion for Committal Proceedings (encl. 90) together with the respective notices to show cause against the six parties on 23 February 2012.

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The Court's Findings

[6] It is not disputed that the notice of motion, the affidavit in support, the respective notices to show cause, the statement pursuant to O. 52 r. 2 of the Rules of the High Court 1980 were personally served on the defendant, BESB and the company G secretaries (Subramaniyam and Lim).

[7] As for the directors, Krishnappan and Rama, their counsel had on 9 March 2012 confirmed on 9 March 2012 that his clients waived personal service of the committal papers. H

[8] It is also not disputed by all the six parties that they have failed to comply with the December order. Therefore it behoves upon me to find the six contemnors guilty of contempt.

[9] Hence the issue now is only with regards to: I

(i) whether there are mitigating factors;

(ii) whether the contemnors have apologised to the court, that have a bearing on the sentences to be imposed.

Whether There Are Mitigating Factors

[10] It was submitted by the defendant that the solicitors acting for the defendant and BESB until 28 February 2012 were Messrs. Zul Rafique & Partners. Hence it is the position of the six contemnors that as M/s Zul Rafique & Partners were the solicitors for the defendant and BESB, they left everything to Messrs. Zul Rafique & Partners to handle all the court matters. This is evident from the averments in the affidavits which were filed by Krishna, Rama, Subra & Lim. They averred that they have placed full trust in Messrs. Zul Rafique & Partners.

[11] Thus, I had on 7 March 2012 directed that Cik Norliza/ Encik Norfadli of Messrs. Zul Rafique & Partners (former counsel of the defendants) who had conduct of the case to file an affidavit in response to the allegations hurled against them by Krishna, Rama, Subra & Lim.

[12] Subsequently an affidavit in encl. 100 was filed by Cik Norliza Rasool Khan from M/s. Zul Rafique & Partners. Essentially Cik Norliza averred that:

(i) what was said by the Krishna, Rama, Subra & Lim is not true;

(ii) On many occasions she had repeatedly advised the defendant as to the importance and the urgency of complying with the December order on the disclosure and/or the Mareva order and the consequences of the failure or delay in complying with the same amounts to contempt.

[13] My findings are that, looking at the conduct of Krishna, Rama, Subra & Lim, blaming the solicitors M/s Zul Rafique and Partners is no excuse, for the following reasons:

(i) defendant and BESB have been warned by Cik Norliza of the said order and the repercussion of failing to comply;

(ii) As far as the directors, V. Krishnappan a/l Venkatachalam (Krishnappan) and Rama Narayanan a/l Sathappan (Rama) are concerned, it is highly improbable that as directors they did not know the implication of disobeying a court order.

Even if they do not know it is incumbent on them to consult a lawyer. Ignorance of the law, if any, is no excuse.

In addition, there is no proof to show that M/s Zul Rafique was representing them at the relevant time; even if they did, there was no evidence of any follow up action on the part of the alleged contemnors, to forward whatever particulars to the solicitors so as to ensure compliance with the December order.

Further, Krishnappan had affirmed an affidavit on 16 November 2011 to explain the delay in complying with the *ex parte* injunction order of 6 October 2011 by alleging that the defendant had to seek advice and appoint solicitor to handle this matter and as such was unable to comply with the seven days deadline. Hence, by this fact, it is clear that Krishnappan knew the effect of not complying with the court order.

(iii) What is clear is that Krisnappan and Rama only started to take action after the committal papers were served on them on 27 February 2012. These show the lackadaisical attitude of the directors that they have taken with regards to the December order.

[14] According to the affidavit of Norliza Rasool Khan she averred that emails were sent dated 15 December 2011, 19 December 2011, 3 January 2012 (two emails), 4 January 2012 and 22 February 2012 to Chetty Sevugan, a director of the defendant and BESB. The defendant and BESB have been duly advised of the urgency of complying with the December order. This is evident from the email dated 19 December 2011 which reads:

> Please find attached hereinbelow the English version of the orders made by the court on 15 December 2011. Please note the disclosure required of assets of Bittersweet Sabah Overseas as well as of Bittersweet Sdn Bhd. Kindly revert urgently with the information so that we may prepare the relevant affidavit of disclosure.

[15] The email dated 3 January 2012 reads:

> Also, we are waiting the information for the disclosure of the assets of Bittersweet Sdn Bhd in Malaysia and abroad as well as Bittersweet Sabah Sdn Bhd abroad whether held by the company or its directors, nominees or agents etc to enable us to prepare the disclosure affidavit. This has to be filed urgently.

[16] Krisnappan and Rama affirmed an affidavit on 26 March 2012 stating that they have no knowledge of the emails which was sent to Chetty Sevugan and Anthony Mariadass. They also stated that as Messrs. Zul Rafique & Partners were the solicitors of the defendant, they truly relied on Messrs. Zul Rafique & Partners to take care of their interest.

[17] However it is to be noted that Krishnappan in his affidavit of 19 March 2012 when he affirmed on behalf of the defendant averred that Subramaniyam only wrote on the defendant's letterhead to the defendant's former solicitors on 27 February 2012 "asking them to do the needful by attending to the said matters on an urgent basis and revert". Clearly this was two months way after the requirement to comply to the December order after it was served on the defendant, BESB, Krishnappan and Rama. There was no explanation given as why there was this delay.

[18] Further in view of Chetty Sevugan's averment in his affidavit of 24 October 2011 that "all decisions of the defendant are by consultation with the directors and shareholders of the defendant", it would therefore mean that all the directors of the defendant and BESB were aware of the December order and the importance of compliance with the same. It is no excuse for the defendant and BESB as well as Krishnappan and Rama, as directors of the defendant and BESB in their affidavit of 5 March 2012, 19 March 2012 and 26 March 2012 to say that they were not aware of the emails of Norliza to Chetty.

[19] In any event, since Chetty Sevugan, Krishnappan and Rama are also the directors of BESB, whatever advice they received in their capacity as directors of the defendant regarding the need to comply with the December order would logically be applicable and known to them as directors of BESB.

[20] As early as 15 December 2011 (when Cik Norliza emailed to the defendant and BESB's director, Chetty Sevugan) the defendant and BESB have been duly advised on the importance of complying with the December order and the consequences if failed to do the same. The emails were dated 15 December 2011, 19 January 2012, 3 January 2012, 4 January 2012 and 22 February 2012. Clearly in the email dated 3 January 2012 Cik Norliza stated:

> Please revert to us urgently on the disclosure facts.

[21] Further in the email dated 4 January 2012 again Cik Norliza stated:

> My telephone conversation with you this morning refers ...
>
> We note that the sealed order was emailed to you by CTS. We trust you are aware of the contents of the order and will comply with the same so as not to risk any contempt proceedings.
>
> The matter is fixed for case management on 6 January 2012 and we will update you accordingly.

[22] In the email dated 22 February 2012, she reiterated thus:

> We are also of the view at this stage of the proceedings, it is best for Bittersweet (and BESB) to comply with the disclosure orders in the *Mareva* order. A stay application on the order at this juncture may be too late as Bittersweet and BESB may already be in contempt of court. In light of this, we advise that the disclosure be made urgently. Kindly instruct us on this.

[23] Clearly, despite the warnings and notices given by Cik Norliza to the defendant and BESB on the importance of complying with the December order and the disclosure of the assets of the defendant and BESB, it fell to deaf ears.

[24] In fact the directors of the defendant and BESB seemed to take it very lightly. There does not seem to be any mitigating factors for them.

[25] Similarly with the company secretaries, Lim Sin Chuan (Lim) and Subramaniyam a/l Narayanaswamy (Subramaniyam). Again in their affidavits of 19 March 2012 they blamed Messrs. Zul Rafique & Partners. I cannot believe that as company secretaries they did not know the implication of disobeying a court order. In their affidavit they alleged that:

(i) They genuinely believed that the court orders will be taken care of by the defendant's solicitors;

(ii) They were made to understand by Chetty Sevugan that the former solicitors had been appointed to handle and act on the court matter and as such have placed their trust on the said former solicitors of the defendant; and

A (iii) That they are merely external company secretaries providing secretarial services and as such were not involved in the financial management of the defendant and BESB and are not privy to any matters except for company secretarial matters.

B **[26]** Even if they do not know, it is incumbent on them to consult a lawyer. Ignorance of the law, if any, is no excuse. There is also no proof to show that Messrs. Zul Rafique & Partners was representing them at the relevant time; even if they did, there was no evidence of any follow up action by them to forward whatever C particulars to the solicitors so as to ensure compliance.

[27] The excuse that they are merely external company secretaries is also no excuse as the December order is for them to comply. Moreover, as company secretaries, more often than not they are given the task of:

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(i) Preparing resolutions to open bank accounts of companies;

(ii) Preparing resolutions to purchase and sell land properties or other assets of substantial value;

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(iii) preparing resolutions for the defendant or BESB to pay dividends;

(iv) Filing annual returns; and

F (v) Preparing resolutions to advance loans to shareholders or 3rd parties.

[28] As company secretaries, they also do have knowledge of the existence of bank accounts as well as landed properties, if any, of the defendant and BESB.

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[29] After being served twice with the December order, both the company secretaries could have taken the effort to comply with the same, which they chose not to.

H **[30]** Hence there is no mitigation shown by the alleged contemnors.

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Whether The Apology Tendered By The Six Contemnors Can Be Accepted By The Court

[31] I found that their so called unreserved apology is not genuine given their conduct when being served with the court order. To date they still have not complied with the order. The fact that they continue to disobey the December order by not disclosing the value shows that there has been a deliberate and contumacious breach of the December order. They have been duly advised and warned as to the consequences of non compliance. They began to take serious of the December order after the committal papers were served on them. This fact negates their contention that they did not mean any disrespect to the court. If that was the case they would have complied with the said order.

[32] Therefore, there is no satisfactory explanation given for not complying with the order.

[33] Effectively there is no mitigation factors which can aid the alleged contemnors and the apologies are spurious.

Sentencing

[34] The plaintiff has discharged the onus of proof beyond reasonable doubt that the contemnors have committed contempt of court. The contemnors:

(i) Directors of the defendant V. Krishnappan a/l Venkatachalam (Krishnappan) and Rama Narayanan a/l Sathappan Krishnappan;

(ii) V. Krishnappan a/l Venkatachalam (Krishnappan) and Rama Narayanan a/l Sathappan;

(iii) Company Secretaries – Lim Sin Chuan (Lim) and Subramaniyam a/l Narayanaswamy (Subramaniyam),

are therefore found guilty of contempt.

[35] After taking into consideration the facts and the circumstances of the case, I hereby passed the following sentences:

(iv) Directors of the defendant (Rama and Krishnappan) to pay RM100,000 each in default thereof a sentence of five months imprisonment;

A (v) Krishnappan and Rama be fined for RM70,000 each in default four months imprisonment;

(iv) Company Secretaries – Lim Sin Chuan (Lim) and Subramaniyam a/l Narayanaswamy (Subramaniyam) – RM10,000 each in default two weeks imprisonment.
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